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Supreme Court, U.S.
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NO. 93-1155

In the Supreme Court of the United States

OCTOBER TERM, 1993

JODY WAYNE ARDOIN
Petitioner

versus

SEACOR MARINE, INC.
Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURTS OF APPEALS
FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

1. In this Jones Act and unseaworthiness case, did the United States Court of Appeals for the Fifth Circuit act correctly in affirming the trial judge's factual determination that the complainant failed to meet his burden of proof where the trial judge disbelieved the complainant's version of events and found as a matter of fact that the alleged accident was caused not by any negligence or unseaworthiness attributable to the defendant, but by the complainant's failure to hold the handrails while he attempted to carry his duffel bag down the vessel stairway on which he fell?

LIST OF INTERESTED PERSONS

Mark J. Spansel and Edwin C. Laizer of the law firm of Adams and Reese, counsel for respondent Seacor Marine, Inc., certify that the following listed parties have an interest in the outcome of this case. This representation is made pursuant to Rule 24.1(b) of the Rules of the Supreme Court of the United States:

1. Jody Wayne Ardoin - Complainant/Petitioner

2. Mr. Richard J. Arsenault
   Mr. Galen W. McBride
   NEBLETT, BEARD & ARSENAULT
   P. O. Box 1190
   Alexandria, Louisiana 71309-1190
   Attorneys for Complainant/Petitioner

3. Seacor Marine, Inc.[1] Defendant/Respondent

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[1] Pursuant to Rule 29.1 of the Rules of the Supreme Court of the United States, Seacor Marine, Inc. provides the following list of its parent companies and subsidiaries:

Acadian Offshore Services, Inc.	Seacor Ocean Boats, Inc.
Acadian Supply Ships, Inc.	Seacor Ocean Lines
Anna Offshore, Inc.	Seacor Ocean Support Services, Inc.

LIST OF INTERESTED PERSONS (continued)

4. Mark J. Spansel
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(footnote 1 continued)

Arthur Levy Enterprises
Gem Shipping, Inc.
Gem Shipping, Ltd.
Seacor Holdings, Inc.
Seacor Marine (Gabon), Inc.
Seacor Marine International, Inc.
Seacor Marine (Nigeria), Inc.
Seacor Offshore, Inc.
Seacor Supply Ships Association, Ind.
Storm Shipping, Inc.
Vector-Seacor Ltd.
Veesea Holdings, Inc.,
West Africa Offshore, Ltd.

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Following a bench trial of this Jones Act and unseaworthiness case, the district court found as a matter of fact that petitioner Jody Wayne Ardoin ("Ardoin") had failed to meet his burden of proof, as a result of which judgment was entered in favor of respondent, Seacor Marine, Inc. ("Seacor"). That conclusion was summarily affirmed by the United States Court of Appeals for the Fifth Circuit. Despite the fact that the case turned on issues of fact and credibility, Ardoin now asks this Honorable Court to exercise its jurisdiction to review the case. Seacor respect-

fully submits that Ardoin's Petition for Writ of Certiorari should be denied for the reasons set forth below.

OPINIONS BELOW

The United States District Court for the Western District of Louisiana, docket number CV91-0290-L, rendered its "Memorandum Opinion" rejecting complaint's claims on December 8, 1992. Judgment was entered in favor of Seacor on December 9, 1992. (Petitioner's App. at A-6 through A-12 and A-13, respectfully).

The United States Court of Appeals for the Fifth Circuit summarily affirmed the trial court in an unpublished decision bearing docket number 92-5281 and entered into the record on October 1, 1993. (Petitioner's App. at A-1 through A-5).

STATUTORY PROVISIONS INVOLVED

1. Federal Rule of Civil Procedure 52(a) - Reproduced in Appendix.

2. The Jones Act, 46 U.S.C.A. § 688(a) - Reproduced in Appendix.

3. The Federal Employers' Liability Act, 45 U.S.C.A § 51 - Reproduced in Appendix.

STATEMENT OF THE CASE

In this Jones Act and unseaworthiness case, petitioner Ardoin claimed to have fallen down an interior stair-

way on the M/V SEA ISLAND, a vessel owned, maintained and operated by respondent Seacor. At the time of the alleged accident, Ardoin was the mate aboard the M/V SEA ISLAND, on which he had been assigned for one week. He was an experienced seaman, having worked for Seacor for slightly over three years in a variety of positions aboard numerous vessels.

At approximately 5:30 a.m. on the morning of October 11, 1990, the M/V SEA ISLAND was moored at a dock in Cameron, Louisiana. Ardoin, who was going ashore as part of a normal crew change, fell while attempting to descend the stairway running from the forecastle deck to the main deck of the M/V SEA ISLAND. The accident was unwitnessed and occurred as Ardoin started down the stairs carrying his sea bag, which was approximately 3' long, weighed roughly 15 lbs., and contained his personal clothes and gear.

On February 11, 1991, Ardoin filed suit against Seacor in the United States District Court for the Western District of Louisiana, Lafayette-Opelousas Division, alleging claims under the Jones Act, 46 U.S.C. § 688, and under the general maritime law theory of unseaworthiness. Ardoin waived his right to a jury and in November, 1992, the case was tried to District Judge Richard J. Putnam, who has over thirty-one years experience on the federal bench. After hearing all of the evidence and having the opportunity to assess the demeanor and credibility of the witnesses, Judge Putam disbelieved Ardon's version of events and concluded that the accident was caused by Ardoin's failure to use the available handrails, rather than by any

negligence or unseaworthiness on the part of Seacor.

Although Ardoin initially attempted to suggest in his trial testimony that he was holding the handrails at the time he fell, he finally admitted, after rigorous cross-examination, that he could not remember whether he was using the handrails. However, Ardoin did not admit this crucial point without first attempting to avoid it, and even then, admitted it only in response to questioning by the trial judge:

> Q: All right. Do you remember whether you were using the handrail?
>
> A: I would think so. I have a good habit of using them.
>
> Q: But you really don't recall whether you were or not? You don't specifically recall whether you were using the handrail, do you?
>
> A: I would think so.
>
> Q: You think so but you don't recall?
>
> THE COURT:
>
> Q: Do you remember; were you using the handrail or not? If you don't know, say you don't remember or whatever. If you do remember, say so. We don't want to know what you think.

THE WITNESS:

A: I don't remember.

(Record, Vol. IV, pg. 58, ln. 19 through pg. 79, ln. 7.)

Within fifteen minutes after the accident, Ardoin completed two accident reports in his own handwriting, one for Seacor and one for the dock owner, Conoco. In the Seacor accident report, Ardoin wrote "I was coming down the stairs an [sic] to the galley and fall [sic]. I was carrying my bag of clothes." In the Conoco accident report, Ardoin wrote "I was coming down the stairs to the galley and fell. I had a bag in my hand." In neither report did Ardoin mention anything about any condition of the vessel playing any part in his accident.

Throughout this litigation, Ardoin attempted to gloss over the obvious fact that his accident was caused by his failure to hold the handrail by claiming that his accident was caused by some condition of the stairway. In so doing, Ardoin took what could best be described as a "shotgun" approach, throwing out a number of mercurial theories and hoping to convince the lower courts that Seacor was at fault.

Ardoin's original complaint specifically alleged only that the lighting was insufficient. In the pre-trial stipulations filed in the trial court, Ardoin modified his claim to allege that the accident occurred because at the time of the accident: (1) there were *no lights* on inside the vessel; (2) the non-skid material on the stairs was worn and in poor condition; and, (3) there was an accumulation of foreign

substances present on the stairs. At trial, Ardoin's contentions shifted again, as he added for the first time the claim that the stairs were not deep enough and were too steep.

As is recognized in Section III of the Fifth Circuit's summary opinion in this case (Petitioner's App. at A3-4), Ardoin failed to prove that any of these alleged conditions contributed to his fall. Consequently, both of the lower courts concluded as a matter of fact that Ardoin had failed to meet his burden of proving negligence and legal causation. To illustrate the correctness of the lower courts' decisions, Seacor will briefly outline the evidence which was presented at trial regarding each of the conditions which Ardoin sought to blame for his accident.

1. Condition of the Non-Skid Tape

In his Petition for Writ of Certiorari at page 3, Ardoin now claims that his fall was caused "... primarily by the worn and frayed condition of the non-skid tape covering a portion of each tread on the stairwell." At trial, Ardoin described the non-skip tape as "worn, torn, peeling, smooth and slick, frayed," a phrase which he disingenuously denied having memorized in preparation for his testimony. The lower courts contrasted the articulateness of this description with Ardoin's inability to recall how many handrails were present in the stairwell and with his narration of the accident in the two aforementioned handwritten accident reports which he completed within minutes of his fall. In neither of those accident reports did Ardoin mention anything about any alleged insufficiency or involvement of the non-skid tape. Indeed, as noted above, the allegation of inadequate non-skid tape did not even appear in Ardoin's original complaint, which was filed four months after the accident.

Contrary to the suggestion contained in Ardoin's Petition for Writ of Certiorari, Ardoin's claim was absolutely not supported by the testimony of deckhand Michael Sampson. While Sampson did testify on direct examination that the tape was worn, Ardoin fails to appraise this Court of the fact that on cross-examination, Sampson directly contradicted himself by stating that the tape was still "pretty good." Sampson also contradicted Ardoin's testimony that the vessel had run out of non-skid tape so that the crew could not finish replacing the tape, a routine maintenance task which Ardoin had started but failed to complete in the days before his fall. When examined on this topic, Sampson testified that the tape was never used on outside steps (as Ardoin claimed) and that he did not recall running out of tape. Again, this important fact is omitted from Ardoin's Petition for Writ of Certiorari.

Ardoin's papers also attempt to suggest that his version of events was supported by the ship's cook. Patricia Steinauer. While Ardoin represents to this Honorable Court that Steinauer testified that the non-skid tape was wearing out, he fails to point out that the trial court flatly rejected Ms. Steinauer's hopelessly confused and contradictory testimony, calling it "valueless." As the trial court correctly noted, Ms. Steinauer testified at trial that she never used the steps in question. She also repudiated as "mistakes" two earlier recorded statements in which she had indicated that she was sitting in the galley at the time of the accident. At trial, she testified that she was actually in her room asleep at the time.

Seacor presented the clear, credible and convincing testimony of Gary Williams, the captain of the M/V SEA

ISLAND. He deflated Ardoin's claim that the vessel had run out of non-skid tape by explaining that he had not ordered Ardoin to use the tape outside, because non-skid is used only on inside stairways. Captain Williams also testified that there were at least two rolls of non-skid tape in stock on the vessel at the time of the accident, which he remembered because he had obtained the tape from Seacor's safety representative several weeks earlier. With respect to the condition of the tape on the day of the accident, Captain Williams testified that after he learned of the alleged accident, he inspected the steps and found that although it had been in use for some time, the tape was still in good condition and still had good traction qualities.

Seacor also offered the testimony of Arthur Sargeant, who was accepted by the trial court as an expert in naval architecture and marine engineering. Mr. Sargeant explained that even without the non-skid tape, the checkered plate, raised diamond patterned surface of the steps made them safe and slip-resistant. Mr. Sargeant characterized the tape as an "extra precaution" and explained that even tape in a condition like that described by Ardoin would not have presented either a tripping or slipping hazard.

2. Insufficient Lighting

Although his pre-trial pleadings suggested that there were no lights on inside the vessel, Ardoin admitted at trial that in actuality, there were lights on at the top and bottom landings of the stairway, in the bathrooms at the top and bottom of the stairway, and in the engineer's room,

which was directly across from the top of the stairway. Several witnesses, including Sampson, Williams and Sargeant, testified that the lighting was adequate and sufficient. Sargeant's testimony established that the lighting not only met Coast Guard standards, but also met good naval architecture and marine engineering standards.

3. Foreign Substances on Stairs

Although this claim was included in his pre-trial pleadings, Ardoin was forced to abandon it at trial. On direct examination by his own counsel, this claim was not discussed. When confronted on cross-examination with his claim in the pre-trial stipulations that foriegn substances had been involved in the accident, Ardoin initially attempted to claim that there "could have been" a foreign substance present. However, when pushed, Ardoin eventually withdrew this contention and admitted that he was no longer claiming that a foreign substance was involved. Not surprisingly, Sampson and Williams, the other witnesses who testified as to the condition of the steps on the day of the accident, both confirmed that the steps were clean and free of foreign substances.

4. Depth and Steepness of Steps

The issue as to whether the steps were too steep or too narrow was raised for the first time at trial. Again, this allegation was contradicted by the testimony of the witnesses, particularly including Mr. Sargeant, who explained that the stairway was similar in design and construction to those on most offshore supply vessels. As Mr. Sargeant explained, the M/V SEA ISLAND is a Coast

Guard inspected vessel and the stairway in question met both Coast Guard and A.B.S. requirements.

The Trial Court's Conclusion

Having heard all of the testimony and viewed the numerous exhibits which were offered into evidence, the trial judge concluded that Ardoin failed to carry his burden of proving negligence or unseaworthiness. In so doing, the trial judge made credibility determinations and came to the conclusion that Ardoin's version of events was not believable, specifically finding as a matter of fact that Ardoin did not hold the handrails as he proceeded down the steps and that it was the failure to use the handrails which caused the accident. The trial court also found that none of the alleged conditions cited by Ardoin contributed to the accident. These factual findings were summarily affirmed by the United States Court of Appeals for the Fifth Circuit.[2]

ARGUMENT

I. No Special and Important Reasons Exist to Grant Certiorari

This was a fact-specific case in which the able and experienced trial judge carefully considered the evidence and

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[2] Ardoin actually appealed only the Jones Act negligence issue to the Fifth Circuit. Likewise, in his petition for writ of certiorari in this Court, Ardoin does not brief the lower courts' rejection of his unseaworthiness claim; accordingly, the unseaworthiness claim is not before this Court. See Rule 14.1 of the Rules of the Supreme Court of the United States.

testimony, drew conclusions regarding the demeanor and credibility of the witnesses, and made factual findings which were fully supported by the record. Although he attempts to couch the issue presented to this Honorable Court as a question of law, Ardoin's Petition for Writ of Certiorari effectively asks this Court to review the trial judge's factual conclusion that Ardoin failed to prove his claims against Seacor, which is the same argument that was summarily rejected by the Fifth Circuit. Ardoin's Petition for Writ of Certiorari presents none of the "special and important reasons" which would be required to justify review by this Court.

It is axiomatic that review on writ of certiorari is not a matter of right, but of judicial discretion. For many years, in determining whether writs of certiorari should be granted, this Court has applied the principle:

> ... that it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal.

Layne and Bowler Corp. v. Western Well Works, Inc., 261 U.S. 387, 393, 67 L.Ed. 712, 714, 43 S.Ct. 422, 423 (1923). For this reason, Rule 10.1 of the Rules of the Supreme Court of the United States makes clear that review on writ of certiorari will be granted only when there are "special and important reasons therefore." The rule sets forth the following examples of the "character of reasons" that will

justify review:

(a) When a United States court of appeals has rendered a decision in conflict with a decision of another United States court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(b) When a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last resort or a United States court of appeals.

(c) When a state court or a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

For obvious reasons, this list does include what Ardoin seeks; i.e., review of the factual findings of lower federal courts.

Reference to petitioner's papers will show the absence of any statement regarding the existence of any alleged "special and important reasons" for review. This, of course, is because no such reasons exist in this case, which turned on questions of fact and credibility. For this reason alone, petitioner's writ application should be denied.

II. The Factual Findings of the Trial Court Were Correct and Were Properly Affirmed Under the Clearly Erroneous Standard

As discussed above in the "Statement of the Case" portion of this brief, although he modified his claims several times during the course of the litigation, Ardoin went into the trial alleging that his fall was caused by worn non-skid tape on the steps, inadequate lighting, the narrowness and steepness of the steps, and the presence of foreign substances on the steps. Under cross-examination, Ardoin abandoned the foreign substance claim. The remaining claims were carefully considered and rejected by the trial court after hearing all of the evidence.

The trial court's "Memorandum Opinion" carefully dissected each of Ardoin's remaining claims. (See Petitioner's App. at A-6 through A-12). Noting the inconsistencies in Ardoin's testimony and the contradictions in the testimony of his witnesses, the trial judge accepted the testimony of Seacor's witnesses and found: (1) that although the non-skid tape had been in use for some time and was worn, it was not frayed, torn or dangerous as plaintiff cliamed; (2) that the lighting was proper and adequate; and (3) that the depth and steepness of the stairway was normal and appropriate.

Most importantly, the trial court also found that Ardoin was not holding the easily accessible handrails as he descended the stairs and that this caused the accident. Remarkably, Ardoin's Petition for Writ of Certiorari never mentions this crucial factual finding.

It is clear that questions of negligence and causation

in admiralty cases are treated as factual findings and are reviewed under the clearly erroneous standard. *See* F.R.C.P. 52(a) and *Gavagan v. U.S.*, 955 F.2d 1016, 1019 (5th Cir. 1992), quoting *Noritake Co., Inc. v. M/V HELLENIC CHAMPION*, 627 F.2d 724, 727-28 (5th Cir. 1980). Under this standard, a factual finding is clearly erroneous only "when although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed." *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 573, 105 S.Ct. 1504, 1511, 84 L.Ed.2d 518 (1985). Where there are two permissible views of the evidence, the fact finder's choice between them cannot be clearly erroneous. *Anderson, supra*, 470 U.S. at 573-74, 105 S.Ct. at 1511.

Rule 52(a) of the Federal Rules of Civil Procedure specifically requires that due regard be given to the opportunity of the trial court to judge the credibility of the witnesses. Credibility choices and the resolution of conflicting testimony are matters within the province of the trial court sitting without a jury, subject only to the clearly erroneous rule. *Gifford v. National Gypsum Co.*, 753 F.2d 1345 (5th Cir. 1985).

The trial court in this case was confronted with incredible and inconsistent testimony from Ardoin regarding his unwitnessed accident and was further confronted with inconsistent and conflicting evidence from the witnesses Ardoin called to support his case. Seacor's witnesses, on the other hand, were consistent, credible and impressive. As was his duty, the trial judge utilized his extensive experience to weigh the evidence and the conflicting

testimony and made the factual finding that there was no negligence or unseaworthiness on Seacor's part and that the accident was caused by Ardoin's failure to hold the handrail. The United States Court of Appeals for the Fifth Circuit had no difficulty in summarily affirming these findings.

Seacor submits that the factual findings at issue are precisely the kinds of findings which must upheld under the clearly erroneous standard. The lower courts acted correctly in rejecting Ardoin's claims, and Ardoin's Petition for Writ of Certiorari should be denied.[3]

III. Both the Trial Court and the Fifth Circuit Applied the Proper Law

Recognizing the futility of attacking the trial court's factual findings, Ardoin argues that the trial court applied an improper legal standard in deciding this case. In particular, Ardoin argues that the trial court evaluated his conduct under a standard of "ordinary care." Citing

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[3] Ardoin seems to suggest in his Petition for Writ of Certiorari at page 6 that the trial court's denial of Seacor's motion for judgment as a matter of law at the close of Ardoin's case somehow establishes the correctness of his position. In the first place, Ardin's account of the trial Judge's comments in denying the motion is misleading; taken in their entirety, the comments clearly show that the judge was not ruling on liability, but was simply exercising his right to hear the defendant's case. Moreover, it is obvious that the denial of a motion for judgment as a matter of law at the conclusion of the plaintiff's case cannot be construed as a ruling in favor of the plaintiff on the merits, because if it could, then virtually every case would end at the conclusion of the plaintiff's case, depriving the defendant of the right to to put on evidence. *See Armour Research Found. of Ill. I. of T. v. Chicago, R.I. & P.R. Co.*, 311 F.2d 493 (7th Cir. 1963), *cert. denied* 372 U.S. 966, 10 L.Ed.2d 129, 83 S.Ct. 1091 (1964) and *Integrated Circuits Unlimited v. E.F. Johnson Co.*,

several Fifth Circuit cases, Ardoin asserts that a Jones Act seaman's conduct should be evaluated under a standard requiring the seaman to exercise only a slight duty to protect himself.[4]

Ardoin's argument is fatally flawed from the outset because while he claims that an improper legal standard was applied to his conduct (i.e., comparative negligence), the reality is that the comparative negligence issue was never reached, because, as the Fifth Circuit noted in its opinion, the trial court determined that Ardoin failed to carry his burden of proving negligence or causation, slight or otherwise, on the part of Seacor. Without proof of these threshold issues, there could be no liability regardless of the standard used to judge Ardoin's actions.

In any event, the trial court correctly applied the law as enunciated by this Court. In *Ferguson v. Moore-McCormack Lines,* 352 U.S. 521, 1 L.Ed.2d 511, 77 S.Ct. 457 (1957), this Court recognized that the appropriate standard of care for a Jones Act employer is that set forth in *Rogers v. Missouri Pacific Railroad,* 352 U.S. 500, 524, 559, 1 L.Ed.2d 493, 515, 77 S.Ct. 443, 459, 478, *reh. den.*, 353 U.S. 943, 1 L.Ed.2d 764, 77 S.Ct. 808 (1957), a F.E.L.A.

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[3] 875 F.2d 1040 (2d Cir. 1989), both of which rejected similar arguments.

[4] As he did in the Fifth Circuit, Ardoin takes issue in this Court only with the trial court's handling of the Jones Act claim. He has not argued or briefed the unseaworthiness issue, which is therefore waived. See footnote 3 above.

case:

> It involves the same general concept on which is based every 'negligence case' in the state courts and in the multitudinous cases in the federal courts on diversity of citizenship in which the question is merely one of common-law negligence; that is, it is the familiar type of litigation that is part of the day-to-day business of state and federal trial judges.

Rogers, supra, 352 U.S. at 538, 1 L.Ed.2d at 527.

With regard to causation, this Court said in *Rogers, supra*, 352 U.S. at 506, 1 L.Ed.2d at 499:

> Under [the FELA], the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought.

In discussing the burden of proof applied to this case, Judge Putnam quoted directly from this Court's decisions:

> So far as the claim under the Jones Act for negligence is concerned, Plaintiff must prove not only that there was negligence on the part of his employer, Seacor Marine, Inc., but that such negligence "played any part, even the slightest, in producing the injury ... for which damages are sought." *See Rogers v. Missouri Pacific Railroad*, 352 U.S. 500, 524, 559, 1 L.Ed.2d 493, 515, 77 S.Ct. 443, 459, 478, *reh.den.*, 353 U.S. 943, 1 L.Ed.2d 764, 77 S.Ct. 808 (1957); and *Ferguson v. Moore-McCormack Lines*, 352 U.S. 521, 1

> L.Ed.2d 511, 77 S.Ct. 457 (1957), and their progeny. After carefully considering all of the evidence introduced by Plaintiff and that opposed to it, we cannot say that this burden has been carried. (*See* Petitioner's App. at A-10).

This excerpt of the trial court's opinion clearly shows that the trial court correctly applied the legal standard developed by this Honorable Court in *Ferguson* and *Rogers* and concluded that Ardoin had failed to carry his burden of proving negligence or causation against Seacor.[5]

Since comparative fault was never reached, the issue Ardoin attempts to raise is moot. However, even if comparative fault were properly at issue, evaluation of Ardoin's conduct under an "ordinary prudence" standard of care would have been appropriate under the law established by this Court. Indeed, in *Page v. St. Louis Southwestern Railway Company*, 349 F.2d 820 (5th Cir. 1965), the Fifth Circuit recognized that the standard of care should be one of "ordinary prudence" for both employee and employer:

> As to both attack or defense, there are two common elements, (1) negligence, i.e., the standard of care and (2) causation, i.e., the relation of the negligence to the injury. **So far as negligence is concerned, that standard is the same - ordinary prudence - for both Employee and Railroad alike.** Unless a contrary result is imperative, it is at

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[5] The Fifth Circuit cases which Ardoin cites on page 5 of his Petition for Writ of Certiorari are all inapposite as they address the standard of care to be utilized in determining comparative negligence, an issue which was never reached in the instant case.

> best, unfortunate if two standards of causation are used. We think there are several reasons why substantively there is no such imperative. (Emphasis applied).

Id. at 823.

To the extent that some more recent Fifth Circuit cases suggest that a "slight negligence" standard is to be used in judging comparative fault, those cases mistakenly follow *Spinks v. Chevron Oil Company*, 507 F.2d 216 (5th Cir. 1975), *clarified*, 546 F.2d 675 (5th Cir. 1977), in which the Fifth Circuit, citing *Ferguson*, erroneously departed from the *Rogers/Ferguson* "ordinary care" negligence standard by misapplying the term "slight" in describing both the employer's and the employee's standard of care. *Spinks*, 507 F.2d at 223. The use of the word "slight" in *Rogers*, 352 U.S. at 506, 1 L.Ed.2d at 499, related to causation and not to the standard of care. Through uncritical repetition in cases such as those cited on page 5 of Ardoin's Petition for Writ of Certiorari, the word "slight" has erroneously become associated with the standard of conduct in some Fifth Circuit cases. However, other Fifth Circuit cases, such as *Gavagan*, *supra*, 955 F.2d at 1019 n.7 (5th Cir. 1992), correctly follow *Ferguson and Rogers* and state the general negligence standard as one of "ordinary prudence."

While there is some conflict in the Fifth Circuit cases as to the proper standard of care to be used in determining comparative fault in Jones Act cases, the conflict need not be resolved in this case, because here, the trial court found no negligence (slight or otherwise) or causation against Seacor. Even in a Jones Act case, the plaintiff has the

burden of proving by a preponderance of the evidence that the defendant was negligent and that the defendant's negligence played any part, even in the slightest, in producing the injury. As the Fifth Circuit recognized in its review of this case, Ardoin failed to meet even this relaxed burden of proof.[6]

CONCLUSION

Respondent, Seacor Marine, Inc. respectfully submits that there are no "special and important reasons" why this case should be reviewed by this Court. The real issues involved here, which were correctly decided by the lower courts, involve the factual findings made by the trial judge. Those factual findings were fully supported by the record and were properly and summarily affirmed by the United States Court of Appeals for the Fifth Circuit under the clearly erroneous standard of review. Ardoin's request for review by this Court amounts to a request that this Court review the factual findings of the lower courts.

While the lower courts' rejection of Ardoin's claims is obviously important to the parties in this case, it

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[6] Alternatively, Seacor submits that if any error was made, it was harmless error within the meaning of Rule 61 of the Federal Rules of Civil Procedure. Since the outcome of the case hinged on credibility determinations, the simple fact is that if the case were returned to the trial court for using the phrase "ordinary care" instead of "slight care," the result would be that the trial court would issue a new opinion making exactly the same findings, but replacing the word "ordinary" with the word "slight." It appears that Ardoin recognizes this, for if he truly believed that the trial court had applied an incorrect standard, he presumably would have sought to remedy the problem in the trial court by seeking an amendment of the trial court's findings under F.R.C.P. 52(b) or by seeking a new trial under F.R.C.P. 59.

presents no issue of importance to the general public. This case does not implicate any of the "character of reasons" traditionally considered by this Court in determining when to exercise its jurisdiction on writ of certiorari.

In short, this case was correctly decided both factually and legally in the lower courts and does not merit review by this Honorable Court. Accordingly, respondent, Seacor Marine, Inc. submits that the Petition for Writ of Certiorari filed by Jody Wayne Ardoin should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing pleading has been served on Mr. Richard J. Arsenault, counsel of record for petitioner, by United States mail, postage prepaid and properly addressed this 1st day of February, 1994.

MARK J. SPANSEL
EDWIN C. LAIZER

APPENDIX

1. Rule 52 of the Federal Rules of Civil Procedure:

Rule 52. Findings by the Court; Judgment on Partial Findings

(a) **Effect.** In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rule 12 or 56 or any other motion except as provided in subdivision (c) of this rule.

2. The Jones Act, 46 U.S.C.A. § 688:

§ 688. Recovery for injury to or death of seaman

(a) Application of railway employee statutes; jurisdiction. Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such action shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

3. The Federal Employers' Liability Act, 45 U.S.C.A § 51:

§ 51. Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; definition of employees

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable

in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and , if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employees of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this Act be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this Act and of an Act entitled "An Act relating to the liability of common carriers by railroad to their employees in certain cases" (Approved April 22, 1908)[45 USCS §§ 51 et seq.] as the same has been or may hereafter be amended.